NO. 14,745

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN ROGERS MacKENZIE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Oregon.

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INDEX

Contents of Brief

Page

Opinion Below ... 1

Jurisdiction and Statutes Involved ... 1

Questions Presented ... 2

Counter Statement of the Case ... 2

Summary of Argument ... 3

Argument:

I. Upon Appeal in Criminal Case, Appellate Court Will Not Consider Additional Evidence not Presented to Trial Court. ... 4

II. On Review of Judgment in Criminal Case, Appellate Court Will Not Take Judicial Notice of Evidentiary Matters not Called to Attention of Trial Court. ... 4

III. The Indictment Properly Charged, and Proof Established, Pertinency of Questions Asked Appellant. ... 4

IV. The Indictment and Proof Were Sufficient with Regard to Element of "Wilfulness". ... 6

V. Trial Court Properly Ruled Appellant Not Entitled to Invoke Privilege Against Self-Incrimination. ... 6

VI. Appellant Properly Directed to Answer Questions, in Each Count. ... 11

Conclusion ... 12

INDEX

Cases Cited

Page

Alexander v. U. S., 9 Cir. 1950, 181 F. 2d 480 7, 8

Barsky v. U. S., D.C. Cir. 1947, 167 F. 2d 241, cert. den. 334 U.S. 843, 1948 5

Bart v. U. S., 349 U.S. 219, 1955 11

Eisler v. U. S., D.C. Cir. 1948, 170 F. 2d 273, cert. den. 338 U.S. 883, 1949 9

Emspak v. U. S., 349 U.S. 190, 1955 11

Hoffman v. U. S., 341 U.S. 479, 1951 3, 12

Jackins v. U. S., 9 Cir. 1956, 231 F. 2d 405 7, 8

Lowden v. U. S., 9 Cir. 1951, 187 F. 2d 484 12

Quinn v. U. S., 349 U.S. 155, 1955 11

Sinclair v. U. S., 279 U.S. 263, 299, 1929 12

Starkovich v. U. S., 9 Cir. 1956, 231 F. 2d 411 7, 8

U. S. v. Costello, 2 Cir. 1952, 198 F. 2d 200, cert. den. 344 U.S. 874, reh. den. 344 U.S. 900, 1952 9

U. S. v. Fleischman, 339 U.S. 349, 360, 1950 3, 12

U. S. v. Josephson, 2 Cir. 1948, 165 F. 2d 82, cert. den. 333 U.S. 838, 1948 13

Young v. U. S., D.C. Cir. 1954, 212 F. 2d 236, 239, cert. den. 347 U.S. 1015, 1954 5

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OPINION BELOW

The judgment of the District Court was rendered upon jury verdict without an opinion.

JURISDICTION AND STATUTES INVOLVED

By order of this Court permitting it, adoption of the like sections in the brief filed contemporaneously in *Donald M. Wollam v. United States of America,* No. 14,744, is made by reference.

QUESTIONS PRESENTED

Appellee hereby adopts by reference the Questions Presented listed as numbered 1 to 7, inclusive, in Appellee's *Wollam* brief.

COUNTER STATEMENT OF THE CASE

Appellant was called as a witness before a public session of a Subcommittee of the House Un-American Activities Committee. Preliminary questions to establish for the Committee the identity and background of the witness were asked him. He refused to answer them, claiming privilege. These concerned his residence, his employment, his college education and age. In support of a motion to dismiss the indictment, appellant filed an affidavit (R. 6-9), in which he stated his employment, general background and his college education. He did not therein state his exact address, but stated that he was a resident of Clackamas County, Oregon. Further, at the time of the arraignment, appellant, through his counsel, expressed the desire to purge himself of the contempt and was allowed time to make a showing thereon, although he did not do so (R. 19).

Appellant in his brief has relied on evidentiary matter outside the record and not submitted to the trial court.

The trial court found the questions pertinent, the refusals to answer not privileged, and the jury found the appellant guilty of refusal to answer the questions after being instructed that in order to make such finding they must find the refusals were deliberate, not accidental or inadvertent.

No issue is presented contesting the Subcommittee's directions to answer and the denial of the claim of privilege.

SUMMARY OF ARGUMENT

Appellee adopts by reference the Summary of Argument's first two paragraphs of that topic in Appellee's Brief in the *Wollam* case, except that herein, R. 35-49 is referred to instead of R. 50-60 as in the *Wollam* brief. Appellant has improperly relied on appeal on evidence not found in the record. The indictment and proof were sufficient.

The proof supports the jury verdict that the appellant acted wilfully, deliberately and intentionally, not inadvertently. The court found the identifying questions pertinent and the refusal to answer them not privileged. The record supports these rulings.

The appellant failed at the trial, through any evidence, to show the trial court anything that would support the claim of privilege. The claim of the witness that answer would incriminate him does not of itself establish the hazard. *Hoffman v. U. S.,* 341 U.S. 479, 1951. The burden of going forward with the evidence may shift. *U. S. v. Fleischman,* 339 U.S. 349, 360, 1950.

The Subcommittee clearly directed the appellant to answer the questions and denied his claim of privilege. This element is undisputed in this case.

ARGUMENT

I. Upon an Appeal in a Criminal Case, the Appellate Court Will Not Consider Additional Evidence Which Had Not Been Presented to the Trial Court.

Appellee adopts by reference its argument on this topic in the *Wollam* case (pp. 6-8, incl., *Wollam* brief).

II. On Review of Judgment in a Criminal Case, the Appellate Court Will Not Take Judicial Notice of Evidentiary Matters Not Called to the Attention of the Trial Court.

Appellee adopts by reference its argument on this topic in the *Wollam* case (pp. 8-10, incl., *Wollam* brief).

III. The Indictment Properly Charged, and the Proof Established, the Pertinency of the Questions Asked Appellant.

A. *The Indictment Properly Charged Pertinency of the Questions Asked Appellant.*

The discussion in the *Wollam* brief on this topic (pp. 10-12, incl.) is equally applicable here, and is adopted in full by reference herein.

B. *The Proof Supported the Court's Findings of Pertinency.*

The first two paragraphs of the *Wollam* brief (pp. 12-14, incl.) on this topic are incorporated herein by reference.

In addition, the testimony explains their pertinence (R. 35-49). Particularly we invite the court's attention to the testimony of the witness Kunzig concerning identifying questions. On cross-examination at R. 62, he said:

> "We want to get identifying questions and find out—we always ask these identifying questions to

> find out where the person lives, perhaps his age, his place of employment, and his name, because we have to know who it is that is sitting in front of us. These two Congressmen would go back to Washington, D. C., and say, 'We had some fellow sitting before us in some city out West who said something or other.' We have to go back and say, 'We had this witness. His name is Mr. MacKenzie. He lives at such-and-such address, and he said the following things under oath and gave us the following information under oath, and we now turn it over to you, the Congress, to pass legislation based upon what he said.' "

The objection, which seemed to be the theory of defense at the trial that the Subcommittee already knew the answers to the questions, would, if true, be no defense. *Young v. U. S.*, D.C. Cir. 1954, 212 F. 2d 236, 239, cert. den. 347 U.S. 1015, 1954.

Exhibit 5, introduced in evidence by the government at the trial contains the full testimony of appellant before the Subcommittee. That the questions were pertinent, in addition to being so on their face because of their preliminary identifying nature, were explained to be so by testimony at trial (R. 43-49, incl. and 61-63, incl.).

Appellee is unable to understand and submits that the court should reject appellant's contention that whether the witness' age was 13 or 30 was irrelevant. *Barsky v. U. S.*, D.C. Cir. 1947, 167 F. 2d 241, cert. den. 334 U.S. 843, 1948. Such a contention ignores the importance of knowing the full background of a witness to better evaluate his experience and testimony.

IV. The Indictment and Proof Were Sufficient With Regard to the Element of "Wilfulness".

A. *It Is Not Necessary to Specifically Allege Wilfulness in the Charge.*

The discussion of this topic in the *Wollam* Brief for Appellee is adopted and incorporated herein by reference (*Wollam* Brief, pp. 14-15).

B. *The Proof Established that the Appellant's Refusals Were Deliberate, Intentional and Wilful.*

Except for the second and concluding paragraphs of the discussion of this topic in the Appellee's Brief in the *Wollam* case, which appear inapplicable herein, the discussion in the *Wollam* case (pp. 15-17, incl.) is adopted and incorporated herein.

The testimony (Ex. 5, Trial Exhibits) shows the clear instructions and directions to answer, the warning of the possibility of a contempt citation for refusal, and the clear refusals of appellant to answer on the claim of privilege of every question except his name. The jury would have had no basis for finding the refusals were inadvertent or unintentional.

V. The Trial Court Properly Ruled That the Appellant Was Not Entitled to Invoke the Privilege Against Self-Incrimination.

A. *The "Setting" and Circumstances Did Not on the Record Support a Reasonable Fear of Self-Incrimination.*

Appellant newly asserts, drawing upon evidence outside the record, that the Committee was endeavoring to

link him with the Communist Party. He also complains of the "setting" by reference to the *Wollam* Appellant's Brief.

That some peace officers were in attendance at the Committee hearings does not justify fear of self-incrimination.

There is nothing in the setting that in itself is of an incriminating nature for the appellant. The position of the appellant would seem to be that any witness subpoenaed before the Un-American Activities Committee of the House is *ipso facto* on his say-so entitled to claim privilege as to any question asked him.

B. *Answers to the Questions Asked Could Not on the Record Have Incriminated Appellant.*

Appellant states that this Circuit has ruled that in a setting such as was present here, a witness is not required to answer questions dealing with residence and employment, citing *Starkovich v. U. S.*, 9 Cir. 1956, 231 F. 2d 411; *Jackins v. U. S.*, 9 Cir. 1956, 231 F. 2d 405; *Alexander v. U. S.*, 9 Cir. 1950, 181 F. 2d 480. Appellee does not so understand these decisions. In fact, the *Alexander* decision supports the position of the appellee at p. 482, wherein the opinion states:

> "Hence the burden is on appellants to show that they had substantial reason to believe they (the questions) call for answers tending to incriminate them."

The setting in that case was a grand jury. The court also, at p. 486, accords further support to the government's position when it says:

> "Our decision in *Miller v. United States,* 9 Cir., 95 F.2d 492, 494, is not inconsistent with the impossibility rule of the *Arndstein* decision. There we affirmed the district court's conviction for a criminal contempt because, *the burden being on the witness to show the trial court her apprehension of a prosecution in which her declined answer might tend to impugn her,* the evidence on which the trial judge based his decision was not before us." (Emphasis supplied)

The court in the *Alexander* case considered that the question as to employment in the particular setting might be incriminating because some of the witnesses had stated that their occupation was "organizer", and considered with other questions, the answer might well involve being an organizer for the Communist Party. No such circumstances are present herein. The *Jackins* case is only authority for the proposition that in that case the question regarding employment could have involved an incriminating answer. As pointed out in the *Wollam* Appellee's Brief, the *Jackins* case involved answer to a question covering the entire employment history of Jackins from 1935 to 1954 in a setting which the record showed gave the witness there reason for belief that he had been identified as a "full time functionary" of the Communist Party.

The *Starkovich* case, *supra,* does not clothe all questions as to residence with immunity as incriminating in any situation where a witness is being questioned by a Congressional Committee. It only held that on the record in that case because a person of the name of the witness had been stated to be a Communist, and there were two persons of that name discussed, identity of

one discussed could be assisted by identifying the residence of the witness, and this identity therefore could seemingly be incriminating.

Residence is in itself innocuous. The appellant had the burden of showing the trial court in what way answer to the question would cause apprehension of incrimination. He did not do so. In fact, the emphasis at the trial was directed toward the question of pertinence, the defense by the appellant then appearing based on the notion that the Committee had the answers to the questions asked, and that they were therefore somehow not pertinent. Good faith and advice of counsel, if shown, would have been immaterial. *U. S. v. Costello,* 2 Cir. 1952, 198 F. 2d 200, cert. den. 344 U.S. 874, rehearing den. 344 U.S. 900, 1952; *Eisler v. U. S.,* D.C. Cir. 1948, 170 F. 2d 273, cert. den. 338 U.S. 883, 1949.

Appellant contends that he was entitled to claim privilege and refuse to answer the question: "Did you ever attend Reed College?". Appellee submits that the claim of privilege was and is sham. The trial court had before it the Affidavit of the appellant filed in support of his motion to dismiss indictment (R. 6-9, incl.). In that Affidavit, appellant gave his complete educational history, including mention of about one term at Reed College.

He also stated therein that he had been employed with the Fred Meyer organization in Portland for about three years at the time of the hearings, and although not giving his exact address, stated that he was a resident of Clackamas County, Oregon. These are not the

acts and statements of one in genuine apprehension of self-incrimination.

Again resorting to matter outside the record, appellant asserts that stating his age might well have been incriminating, and spins a fanciful and speculative web never urged upon the trial court. The question was identifying—but of appellant *as a witness before the Committee.*

The appellee must in candor suggest that the question concerning residence might conceivably have been incriminating had appellant suggested to the trial court that the Committee counsel had suggested that Communist meetings had been held in appellant's home. That someone may have made such a statement does not in itself mean that the statement was true, or that thereby the witness actually feared incrimination, or would have been incriminated by giving an answer. At the time privilege was claimed to the residence question, the subsequent inferentially incriminating question had not been asked. The trial court must evaluate the reality of the possibility of the incrimination and in doing so must look to the defense made by appellant. The appellant's position during the trial of the cause below was that the appellant's residence was not pertinent (R. 62).

It is submitted that the fact that a third party may make or have made statements prejudicial to the witness is not in itself a basis of assertion of the claim of privilege, in the absence of actual basis for apprehension of prosecution, at least from the point of view of the witness faced with an ambiguous circumstance. The

claim of privilege is not a sinecure for those desiring to remain silent on their own say-so for their own choice of reasons. Appellee suggests that the true reason for the refusal to answer supported by the entire record is not fear of incrimination, but a desire to frustrate the Committee, expressed by appellant in his Affidavit in support of motion to dismiss indictment when he stated:

> "Furthermore, that in refusing to answer these questions, I was not only upholding my Constitutional right but was aiding all the American people in preserving our democratic heritage."

We submit that MacKenzie's personal philosophy of what was of aid to the American people cannot supersede the requirement that he in good faith claim privilege and that the claim be not on the basis of that personal philosophy, but only on his genuine apprehension based upon some reasonable hypothesis that answer to the questions would incriminate him.

VI. Appellant Was Properly Directed to Answer the Questions, in Each Count.

In this case there is no allegation that the directions to answer and denial of the claim of privilege suggested by the cases of *Quinn v. U. S.*, 349 U.S. 155, 1955; *Emspak v. U. S.*, 349 U.S. 190, 1955, and *Bart v. U. S.*, 349 U.S. 219, 1955, were not fully sufficient. The directions were given in clear and unmistakable fashion by the Subcommittee, as to each question charged.

CONCLUSION

The appellant was convicted by a jury of four counts of wilful refusal to answer pertinent questions as a witness before a Congressional Subcommittee. Affirming conviction as to any count will sustain the judgment because the sentence is well within the statutory penalty for violation of a single count. *Sinclair v. U. S.*, 279 U.S. 263, 299, 1929; *Lowden v. U. S.*, 9 Cir. 1951, 187 F. 2d 484.

The questions were on their face innocuous, and the appellant made no trial showing that answering would incriminate him, or that he should have reasonable apprehension that to answer would do so. Because the witness himself is not exonerated from answering merely because he declares that in so doing he would incriminate himself, he had the burden of going forward with some showing to the trial court. *Hoffman v. U. S.; U. S. v. Fleischman, supra.* This he did not do.

The court correctly ruled, and the record supports its rulings, that the questions were pertinent and the refusals to answer them not privileged.

Appellee submits that unless this court is prepared to say that any witness subpoenaed to appear before the House Un-American Activities Committee is by reason thereof placed in a position of reasonable apprehension of self-incrimination sufficient to justify his claim of privilege and to entitle him to claim privilege and refuse to answer any, even innocuous, questions put to him, without further showing of hazard of incrimination, the court should not reverse this conviction.

On any other basis on this record, appellee submits reversal would do violence to the right of government, generally, and even of courts, to compel testimony and have fair opportunity to judge the merits of asserted privilege against self-incrimination. The conditional right to remain silent would be unassailable and absolute.

Appellant was not entitled to defend his refusals to answer on one theory and with chosen evidence at the trial below, and having lost, on appeal defend on another basis and with asserted evidence he did not choose to present in the court below.

The conduct of appellant here is in principle comparable to *U. S. v. Josephson,* 2 Cir. 1948, 165 F. 2d 82, cert. den. 333 U.S. 838, 1948. A like result should follow.

That the privilege against self-incrimination is entitled to liberal construction does not require the court to substitute imagination for reality, nor does it merit the court's becoming the advocate, nor charge the court with responsibility to conjure speculative hazards of incrimination.

The judgment should be affirmed.

Respectfully submitted,

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November, 1956